A

RE LEE PEAK SING; EX P MALAYAN BANKING BHD (NO 2)

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
B [BANKRUPTCY NOTICE NO: S29-102-2010]
12 JANUARY 2012

BANKRUPTCY: *Creditor's petition - Excessive demand - Allegation of - Amount claimed in petition exceeded judgment sum - Whether judgment debtor ('JD') filed notice within seven days upon receipt of bankruptcy notice to dispute amount - Whether non-compliance mere procedural irregularity - Bankruptcy Act 1967, s. 3(1)(i)*

C

BANKRUPTCY: *Creditor's petition - Service - Allegation of - Petition not served personally on judgment debtor ('JD') - Whether JD had knowledge about hearing date of petition - Whether prejudice caused to JD*

D

BANKRUPTCY: *Creditor's petition - Service - Failure to state judgment debtor's ('JD') present address in petition - Whether judgment creditor ('JC') had knowledge of JD's new address - Whether JD notified JC about change of address - Whether JC violated r. 100(2) of the Bankruptcy Rules 1969 - Whether petition defective*

E

CIVIL PROCEDURE: *Stay of proceedings - Bankruptcy, stay of creditor's petition - Pending appeal of judgment in Court of Appeal - Whether court should not proceed with hearing of petition due to pending appeal - Whether appeal automatically operates as a stay - Whether hearing of petition proper and in order*

F

G

The judgment debtor ('JD') filed this appeal against the decision of the learned deputy registrar in dismissing his application to set aside the judgment creditor's ('JC') petition ('CP') dated 15 December 2010. Among the issues that arose for consideration herein were: (i) whether there was non-compliance of r. 100(2) of the Bankruptcy Rules 1969 ('the Rules') since the CP failed to

H

state the correct description of the JD's present address; (ii) whether the CP was personally served on the JD as required under r. 109 of the Rules; (iii) whether the amount of RM4,559,268.20 claimed in the CP was excessive and statute barred; (iv) whether the court should not proceed with the hearing

I

of the CP due to the JD's pending appeal of the judgment in the Court of Appeal; and (v) whether the JC's claim was time barred.

Held (dismissing the appeal with costs):

(1) The JC was not in violation of r. 100(2) of the Rules since the two last known addresses for service, as duly furnished by the JD, were the only addresses known to the JC when the liability incurred. Further, there was no evidence before the court to show that the JD had issued any notification in writing to the JC regarding the change of his address (*Re Chin Kwan Kee ex p Shriro Paper (M) Sdn Bhd*; refd). (paras 6 & 7)

(2) Rule 109 of the Rules stipulates that the CP shall be personally served on the JD. In this case, if the CP was not served personally on the JD, the JD would not have known about the hearing date of the CP, but he did. Besides, there is no requirement under r. 109 of the Rules that the JD must sign and acknowledge receipt on the service copy of the CP. Hence, there was no issue of prejudice caused to the JD as regards to the service of the CP. (paras 8, 11, 12 & 14)

(3) The bankruptcy notice was personally served on the JD on 23 June 2010 and there was no notice filed to dispute the amount within seven days period pursuant to s. 3(1)(i) of the Bankruptcy Act 1967. Thus, the JD's non-compliance on this was not a mere procedural irregularity but a fundamental defect and therefore fatal. (para 16)

(4) The amount claimed in the CP was in accordance with the terms of the judgment obtained on 12 October 2009, which was inclusive of interest and costs computed as at 27 May 2010. Therefore, the allegation by the JD that the amount claimed in the CP was statute barred is misconceived as it would tantamount to requesting the bankruptcy court to go beyond the said judgment. (para 17)

(5) Appeal to the higher court does not automatically operate as a stay. The JD did not obtain a stay of execution and the judgment had not been set aside. Hence, the hearing of the CP was proper and in order. (para 19)

(6) The JC's claim which was filed by way of writ was not statute barred as the said writ was filed nine months after the notice of demand and recall was sent to the JD. As such, the JC's claim was well within the six years' limitation period and was not statute barred under item 9 of the Sabah Limitation Ordinance (Cap 72). (para 22)

Case(s) referred to:

Re Chin Kwan Kee ex p Shiriro Paper (M) Sdn Bhd [1999] 6 CLJ 523 HC ***(refd)***

Re Woo Yoke San, ex p OCBC Bank (M) Bhd [2006] 2 CLJ 589 HC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1998] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Tee Lian Joo v. Tee Tiong Lian [2009] 8 CLJ 208 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

Bankruptcy Rules 1969, rr. 100(2), 109, 110

For the appellant/judgment debtor - Sharatha Lincon; M/s Voo & Co

For the respondent/judgment creditor - Nasrinah Jabirin; M/s Fernandez & Co

Reported by Kumitha Abdul Majid

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is the appellant/judgment debtor's appeal against the decision of the learned deputy registrar given on 14 July 2011 in dismissing the appellant/judgment debtor's application dated 11 April 2011 to set aside the respondent/judgment creditor's petition dated 15 December 2010.

[2] I have read and considered the following:

i) Notice of Intention by appellant/judgment debtor to oppose creditor's petition dated 8 April 2011;

ii) Summons in chambers dated 11 April 2011;

iii) Affidavit in support of Lee Peak Sing affirmed on 11 April 2011;

iv) Affidavit in Opposition of Yong Teck Chong affirmed on 3 May 2011;

v) Affidavit in reply of Lee Peak Sing affirmed on 19 May 2011;

vi) Notice to appeal to judge in chambers dated 14 July 2011;

vii) The appellant/judgment debtor's written submission dated 20 September 2011; and

viii) The respondent/judgment creditor's written submission dated 26 September 2011.

Grounds Of Appeal

[3] The grounds of the appeal are as follows:

i) The creditor's petition is defective and is in violation of r. 100(2) of the Bankruptcy Rules 1969 as it failed to state or to state the correct description of the appellant/judgment debtor's present address;

ii) The creditor's petition was never personally served and/or attempted to serve personally on the appellant/judgment debtor as required under r. 109 of the Bankruptcy Rules 1969;

iii) The statements contained in the respondent/judgment creditor's affidavit in service affirmed on 18 March 2011 by one Asmin bin Samjan is untrue and the service of the creditor's petition pursuant to r. 110 of the Bankruptcy Rules 1969;

iv) The alleged amount of RM4,559,268.20 claimed by the respondent/judgment creditor in the creditor's petition is exceeding the alleged amount of the judgment sum obtained on 12 October 2009 in Suit K22-186 of 2008 which amounted to RM3,740,290.03 only;

v) Further and alternative, some of the component/part of the amount and/or interest claimed by the respondent/judgment creditor in their alleged claim in the creditor's petition is statute barred;

vi) The order of Suit K22-186 of 2008 dated 12 October 2008, where these proceedings originated from, is being appealed by the appellant/judgment debtor and the appeal will be fixed for hearing anytime soon;

vii) The High Court's decision delivered on 10 March 2010 in dismissing the appellant/judgment debtor's appeal to set aside the judgment creditor's Bankruptcy Notice No. S29-102 of 2010 dated 27 May 2010 is not final and is still pending the

A determination of the Court of Appeal. If the said appeal is allowed in the future, the creditor's petition herein shall be rendered nugatory; and

viii) This court should consider the merits of the appellant/judgment debtor's case/defence in allowing this application.

B

Findings Of The Court

Whether The Creditor's Petition Was Served On The Appellant/Judgment Debtor At His Latest Address For Service And There Was Non-
C *compliance Of r. 100(2) Of The Bankruptcy Rules 1969*

[4] The address of the appellant/judgment debtor as stated in the creditor's petition is House No. 17, Taman Pasir Putih, Sandakan and/or Mile 2.5, Sandy Plain, P.O. Box 861, 90709
D Sandakan, Sabah. However, the appellant/judgment debtor alleged that the correct and present address of the judgment debtor is No. 809, 8th Floor, Hawaii Court Block, 88100 Kota Kinabalu, Sabah. Hence, learned counsel for the appellant/judgment debtor submitted that service of the creditor's petition is defective as it
E failed to comply with r. 100(2) of the Bankruptcy Rules.

[5] Learned counsel for the respondent/judgment creditor however contended that the respondent/judgment creditor was right to adopt the judgment debtor's last known address as stated in the guarantee agreements dated 22 September 1994 and 14
F May 1997 ("the said guarantees") respectively in the creditor's petition as the appellant/judgment debtor has failed to give any notification in writing to the respondent/judgment creditor on his change of address.

G **[6]** There was no evidence before the court to show that the appellant/judgment debtor had issued any notification in writing to the respondent/judgment creditor regarding the change of his address. The appellant/judgment debtor's two last known addresses in the creditor's petition are the addresses duly furnished
H by the appellant/judgment debtor in the said guarantees. Hence, the respondent/judgment creditor cannot be blamed for serving at the addresses given to them by the appellant/judgment debtor himself, in the absence of any notification in writing by the appellant/judgment debtor of his new address.

I

[7] In any event, r. 100(2) states that creditors shall also describe the appellant/judgment debtor address as lately residing at the address when the debt or liability was incurred. Since the last two known addresses for service was the only two addresses known to the judgment creditors when the debt or liability was incurred, hence the respondent/judgment creditor was not in violation of r. 100(2) of the Bankruptcy Rules. Hence, this ground is misconceived and devoid of merits.

(See *Re Chin Kwan Kee ex p Shriro Paper (M) Sdn Bhd* [1999] 6 CLJ 523.)

Whether The Creditor's Petition Was Personally Served And/Or Attempted To Serve Personally On The Appellant/Judgment Debtor And There Was Non-compliance Of rr. 109 And 110 Of The Bankruptcy Rules 1969

[8] Rule 109 of the Bankruptcy Rules stipulated that the creditor's petition shall be personally served on the appellant/judgment debtor. In this case, the respondent/judgment creditor had served the creditor's petition on the appellant/judgment debtor by way of personal service and filed an affidavit of service affirmed on 18 March 2011 by one, Asmin bin Samjan.

[9] In the said affidavit of service, the deponent, Asmin bin Samjan stated that the creditor's petition was served on the appellant/judgment debtor but the appellant/judgment debtor refused to sign the Proof of Service of the creditor's petition when he tried to serve the creditor's petition on the appellant/judgment debtor at the address of House No. 17, Taman Pasir Putih, Sandakan on 12 March 2011.

[10] The appellant/judgment debtor contended that the deponent is not telling the truth as the appellant/judgment debtor has moved to Kota Kinabalu to his present address. Therefore, it is unreliable for the deponent to say that the appellant/judgment debtor refused to sign the Proof of Service as the appellant/judgment debtor was no longer staying in Sandakan at that material time. Even if the deponent is telling the truth, the appellant/judgment debtor submitted that the respondent/judgment creditor ought to have applied for substituted service of the creditor's petition pursuant to r. 110 of the Bankruptcy Rules 1969.

[11] The deponent of the affidavit of service has affirmed that he has personally served the said petition to the appellant/judgment debtor but the appellant/judgment debtor had refused to accept and acknowledge the said creditor's petition when service was effected on him. If the said deponent was not telling the truth and the said creditor's petition was not served personally on the appellant/judgment debtor, the appellant/judgment debtor would not know about the hearing date of the said creditor's petition which was fixed on 7 April 2010 but he did.

[12] There is no requirement under r. 109 of the Bankruptcy Rules 1969 that the appellant/judgment debtor must sign and acknowledge receipt on the service copy of the said creditor's petition.

[13] Further, r. 110 of the Bankruptcy Rules is only relevant and applicable if the respondent/judgment creditor was applying for an Order for substituted service and only upon the court's satisfaction that prompt personal service cannot be effected because the appellant/judgment debtor was avoiding service. Hence, by relying on r. 110 of the Bankruptcy Rules 1969, it is obvious that there is an express admission on the appellant/judgment debtor that he is indeed avoiding service of the said petition.

[14] In any event, on the hearing of the said creditor's petition on 7 April 2011, the court had taken the liberty to serve on the appellant/judgment debtor, a copy of the said creditor's petition and the respondent/judgment creditor's solicitors had also *vide* letter dated 13 April 2011 duly served the said creditor's petition on the judgment debtor's solicitors. Hence, I find that this ground is also devoid of merits as there is no issue of prejudice caused to the appellant/judgment debtor, as regards to the service of the said creditor's petition.

Whether The Amount Of RM4,559,268.20 Claimed By The Respondent/Judgment Creditor In The Creditor's Petition Is Excessive And Statute-Barred

[15] Learned counsel for the appellant/judgment debtor submitted that the alleged amount of RM4,559,268.20 claimed by the respondent/judgment creditor in the creditor's petition exceeded the alleged amount of the judgment sum obtained on 12 October

2009 in Suit K22-186 of 2008 which amounted to RM3,740,190.03 only and that some part of the interest claimed by the respondent/judgment creditor in the said petition is statute-barred.

[16] In this case, the bankruptcy notice was personally served on the appellant/judgment debtor on 23 June 2010 and there was no notice filed to dispute the amount within seven-day period pursuant to s. 3(1)(i) of the Bankruptcy Act 1967. I find that the appellant/judgment debtor had failed to dispute on the amount stated in the bankruptcy notice within seven days upon receipt of the said bankruptcy notice. Hence, the appellant/judgment debtor's non-compliance on this is not a mere procedural irregularity but a fundamental defect and therefore fatal. (See *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1998] 1 CLJ 155, [1988] 1 CLJ (Rep) 277; *Re Woo Yoke San, ex p OCBC Bank (M) Bhd* [2006] 2 CLJ 589).

[17] In any event, the amount claimed in the said creditor's petition was in accordance with the terms of the judgment obtained on 12 October 2009 which is inclusive of interest and costs computed as at 27 May 2010. Therefore, the allegation by the appellant/judgment debtor that the amount claimed in the said petition is statute-barred is misconceived as it is tantamount to requesting for the bankruptcy court to go beyond the said judgment. (See *Tee Lian Joo v. Tee Tiong Lian* [2009] 8 CLJ 208).

Whether The Court Should Proceed With The Hearing Of The Creditor's Petition Due To Pending Appeal Of The Judgment In The Court Of Appeal

[18] Learned counsel for the appellant/judgment debtor submitted that it is trite law that no bankruptcy notice shall be issued against the appellant/judgment debtor when the judgment is being appealed against the respondent/judgment creditor.

[19] This argument is totally misconceived as appeal to the higher court does not automatically operate as a stay. There is no stay of execution obtained by the appellant/judgment debtor and the said judgment has not been set aside. Hence, the hearing of the said creditor's petition is proper and in order.

A **Whether The Court Should Consider The Merits Of The Appellant/Judgment Debtor's Appeal On Merits**

[20] Learned counsel for the appellant/judgment debtor submitted that the court should consider the merits of the appellant/judgment
B debtor's case or defence in allowing this appeal. The judgment debtor's defence were that the respondent/judgment creditor's claim in Suit No. K22-186 of 2008 is actually time-barred and that the respondent/judgment creditor has failed to mitigate the damage.

C **[21]** To consider the merits of the appellant/judgment debtor's defence in Suit No K22-186 of 2008 is wrong in law as the bankruptcy court will never go beyond the judgment.

[22] In any event, I find that the writ in Suit No. K22-186 of
D 2008 is not statute-barred as the writ was filed nine months after the Notice of Demand & Recall was sent to the appellant/ judgment debtor in 12 February 2008. The respondent/judgment creditor's claim was well within the six years' limitation period and not statute-barred under item 9 of the Sabah Limitation Ordinance
E (Cap 72)

Conclusion

[23] In the premises, I therefore dismiss this appeal with costs to
F the respondent/judgment creditor.

G

H

I